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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

EMMA TOVAR,

Petitioner,

vs.

IBP, INC.,

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

David O. Alegria
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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Kansas courts, in requiring plaintiffs opposing a motion for summary judgment in a retaliatory discharge case to demonstrate the existence of such retaliatory discharge by presenting clear and convincing evidence sufficient to support a jury verdict in plaintiff's favor, usurps the plaintiff's right to trial by jury, nullifies the cause of action and violates plaintiff's 7th amendment right of trial by jury.

2. Whether it is possible for a plaintiff to fully try a retaliatory discharge case through paperwork in responding to a summary judgment motion

3. Whether in Kansas, plaintiffs opposing a motion for summary judgment have the burden of proving such case by clear and convincing evidence to the court prior to being afforded a right to trial by jury.

LIST OF ALL PARTIES

Petitioner, Emma Tovar.

Respondent/Appellee, IBP, inc.

There are no parent of subsidiary companies to be listed.

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BASIS FOR JURISDICTION

DATE OF JUDGMENT

May 29, 1996

DATE OF ORDER ON REHEARING

July 8, 1996

STATUTORY PROVISIONS FOR JURISDICTION

28 U.S.C. § 2101(c)

NOTIFICATION

N/A

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Petitioner's cause of action is based on common law.

STATEMENT OF THE CASE

This is a retaliatory/constructive discharge case, a tort action. The petitioner, Emma Tovar, was fired from her employment with respondent, IBP, inc., in retaliation for her pursuit of workers' compensation remedies under the Kansas Workers Compensation Act, and for absences related to her work-related injury.

In a Memorandum and Order entered on July 1, 1994, District Kathryn H. Vratil granted Respondent summary judgment. Judge Vratil found that respondent was entitled to summary judgment on the grounds that the petitioner failed to provide clear and convincing evidence of a causal connection between her workers' compensation claim filed on August 15, 1989, and her firing on August 19, 1991.

In this appeal, petitioner submits that this case presents genuine issues of material fact which were ignored by the district court. Specifically, Petitioner presented evidence to support her position that after her injury on August 15, 1989, respondent blamed Petitioner for her work related injury and created a hostile work environment for her. When her doctor took her off work for six months, respondent inappropriately pressured her doctor to return her to work earlier. The district court failed to acknowledge petitioner's

evidence of goals and incentive programs which provided the motivation for respondent's retaliatory actions. Evidence of company procedures were ignored by the district court, where respondent tells its management to find ways to fire injured workers. This appeal seeks an order vacating the summary judgment entered in favor of respondent, so that this case can proceed to trial for decision on the merits.

Most importantly, the issues decided by the court were controverted issues of material fact, which invaded the province of the trier of fact and violated the petitioner's right to trial by jury.

Jurisdiction of this action was conferred upon the district court on the basis of diversity of citizenship, 28 U.S.C. § 1332. Ms. Tovar, the petitioner, is an individual, resident of the state of Kansas. Respondent is a Nebraska corporation with its primary place of

business in Nebraska.

ARGUMENT

This case illustrates a current trend in Kansas wherein courts have taken over the role of a jury and are requiring plaintiffs in retaliatory discharge cases to prove such cases by a clear and convincing standard of proof to the court as a condition precedent to being entitled to a trial by jury. Petitioner contends and thereupon alleges that the right to trial by jury is a constitutionally guaranteed right that is being usurped under the current approach by Kansas courts.

Although, the summary judgment vehicle has been deemed to be constitutional and an expedient way to dispose of disputes, when such procedure is employed by the court to make judgment calls that are within the province of the jury, and the court requires a plaintiff to prove his/her case to the court in order to grant a trial by jury, the procedure becomes

unconstitutional.

Under traditional summary judgment standards, a plaintiff was only required to show that a genuine dispute existed and controverted issues of material fact are at stake. In analyzing such motion the court was only required to determine whether the possibility existed that a reasonable jury could find for the non-moving party. Under such traditional standards for summary judgment, the moving party was required to demonstrate the absence of a triable issue in order to be entitled to summary judgment. If the movant was able to make a sufficient showing that there was an absence of a triable issue, the non-movant was only required to dispute the alleged lack of controversy and come forth with evidence in the record of controverted issues of material fact.

A successful summary judgment motion was an extremely heavy burden imposed upon the moving party and was a vehicle seldom used. Over time,

courts have been increasingly more willing to summarily dispose of cases. Over time, courts have taken over the role of analyzing evidence, assessing the quality of the evidence, assessing the quantity of the evidence, weighing the evidence, and making conclusions as to credibility and intent.

Currently, in retaliatory discharge cases, it has become the practice in Kansas that once a defendant moves for summary judgment, the procedure set in motion requires a plaintiff to, through paperwork, present clear and convincing evidence of entitlement to a favorable jury verdict, before being entitled to proceed to trial.

Procedurally, a defendant circumscribes the parameters of its motion and the evidence to be presented to the court.

A causal connection between the firing of an employee and the exercise of statutory rights by such employee more often than not, can only

be shown through various pieces of circumstantial evidence that tend to make the existence of a fact, more probably true than not. Most importantly, such causal connection is shown through the perception by the trier of fact of the demeanor of the witnesses and the assessment by the trier of facts of a defendant's intent in firing a plaintiff. Because of the manner in which the causal connection must be presented, most often than not, it is impossible for a plaintiff to persuade a court by clear and convincing evidence of the existence of such causal connection in a motion for summary judgment.

In disposing of plaintiff's case at summary judgment stage in *Rodriguez v. IBP, inc.*, U.S. District Court Case No. 94-1168-PFK, the district court ruled that Kansas courts have uniformly held that:

> a party opposing a motion for summary judgment must demonstrate the existence

> of the retaliatory discharge by presenting evidence of a clear and convincing nature sufficient to support a jury verdict in his favor. at p. 11.

Such requirement expressly requires a plaintiff to win his case through paperwork prior to being entitled to trial by jury. The requirement clearly violates a plaintiff's constitutional right to trial by jury.

The defense bar in Kansas has persuaded the judiciary to analyze summary judgment motions employing a clear and convincing standard of proof to weigh the evidence in retaliatory discharge cases and make credibility and motive determinations at such stage

The unique combination of a new a more stringent application of summary judgment standards coupled with a requirement that a plaintiff must present clear and convincing evidence through paper work in essence eliminates a remedy for wrongful discharge in

violation of the public policy of the State of Kansas.

The role of courts in ruling on summary judgment motions in Kansas have gone too far and immediate corrective action is needed. This is petitioner's last chance at justice for herself and for all others whose cases will be disposed at summary judgment stage unless corrective action is taken by this court.

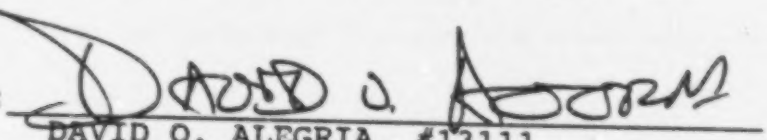
In this case, Ms. Tovar was to be off work by order of her doctor until October 21, 1991 until Respondent was able to inappropriately pressure her doctor into changing his orders. When Ms. Tovar returned to work, still in pain, two months earlier than her doctor had originally ordered, respondent fired her because she didn't return one week earlier. Clearly the motivation for respondent's insistence at her early return was simply to create a situation in which she could be fired. Therefore, she was fired solely and as a direct result of her

exercise of statutory rights under the Kansas Workers' Compensation Act. In spite of the fact that Ms Tovar in good faith, returned to work early at the insistence of respondent, she was fired. Ms. Tovar's case has been summarily disposed merely because respondent argued that she should have returned a week earlier and the district court failed to consider all of petitioner's evidence of respondent's motive and retaliation. There is substantial evidence that Ms. Tovar was harassed and mistreated, all because of her work related injuries. Therefore, had it not been for the Court's improper approach to summary judgment standards, Ms. Tovar's case should have been tried to a jury.

For the foregoing reasons, petitioner respectfully prays that her petition for a Writ of Certiorari be granted and that the court restore to Kansas employees fired in violation of public policy, a right to trial by jury.

Respectfully submitted,

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.

By: 

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APPENDIX

Memorandum and Order, U.S. District Court for the District of Kansas, filed July 1, 1994

Order and Judgment, U. S. Court of Appeals, Tenth Circuit, filed May 29, 1996

Order, U. S. Court of Appeals, Tenth Circuit, entered July 8, 1996

IN THE UNITED SATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ARNOLDO ORTEGA, AND EMMA TOVAR Plaintiffs, v. IBP, inc., Defendant.	)	CIVIL ACTION No. 92-2351-KHV

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant IBP inc.'s Motion for Summary Judgment (Doc. #94) against plaintiff Emma Tovar. Tovar claims that defendant IBP, inc., terminated her employment in retaliation for the exercise of rights under the Kansas Workers' Compensation Act. Defendant seeks summary judgment, arguing that on the undisputed facts IBP terminated Tovar's employments for neutral, non-retaliatory reasons.

Summary judgment is appropriate if "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(d); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). When deciding a summary judgment motion, the Court considers all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). In this diversity case, we ascertain and apply Kansas law such that we reach the same result that a Kansas court would reach. See Adams-Arapahoe School Dist. No. 28-J v. GAF Corp., 959 F.2d 868, 870 (10th Cir. 1992).

A. Factual Claims

The following facts are construed in the light most favorable to plaintiff.

Beginning on May 15, 1975, IBP, inc., hired Emma Tovar at its beef processing plant in Emporia, Kansas. While working as a trimmer, Tovar sustained a work-related injury to her low back on April 14, 1989. After the injury, from April 17 to June 27, 1989, Tovar worked in the laundry folding gloves, a light/restricted duty position. From June 28, 1989, to July 12, 1989, Tovar was off work pursuant to doctor's instructions. She then returned to the glove-folding position. On September 7, 1989, IBP assigned Tovar to the job of picker, another light/restricted duty position. The record is vague concerning Tovar's work attendance between September 7, 1989, and September 28, 1990. Nevertheless, on the sketchy record, it appears to have been erratic.

Four months after the injury, on August 15 1989, Tovar filed a claim for

workers' compensation benefits.

Tovar claims that after the injury Greg Stromgren (IBP chief of security), Nancy Downs (IBP workers' compensation coordinator), and the IBP nurse often shouted and got upset with her, and put pressure on her to do work that she was unable to do.

During 1990, Tovar was treated by Dr. David Tillema, an orthopedic surgeon. On January 23, 1990, Dr. Tillema stated that tovar should return to work with restrictions including no bending or stooping, no lifting over 15 pounds, and no pushing or pulling. He believed she could return to a light-duty job involving sitting and "Bench-type" work.

On February 14, 1990, Tovar applied for vocational rehabilitation assessment and temporary total disability payments pursuant to K.S.A. §44-510g. On April 10, 1990, an administrative law judge granted

that application and, as a result, on April 17, 1990, IBP referred Tovar to Kansas Rehabilitation and Clinical Consultants (KRCC). Crystal Ebberts, a KRCC vocational rehabilitation counselor, took Tovar's case.

On May 29, 1990, Ebberts completed Tovar's vocational assessment and evaluation, noting that Tovar was restricted to a light-duty position. Several weeks later, Ebberts contacted Dr. Tillema and provided him with three job descriptions for light-duty positions which IBP believed Tovar could perform. Those positions involved sorting excess fat from the belt, picking loin wing bottoms and picking trim from the bone belt. Dr. Tillema examined Tovar on July 10, 1990, and concluded that each of the three positions was "quite appropriate." Tovar apparently returned to work in one of the positions but on August 7, 1990,

visited Dr. Tillema with complaints of job-related pain. Dr. Tillema indicated that she appeared to have a "quite appropriate job" and that she should "carry on with her light work."

On September 14, 1990, Tovar reported to Dr. John Wertzberger (another orthopedic surgeon) with similar complaints of pain. Dr. Wertzberger asked Tovar to return to her light-duty position in anticipation of fitting her with a low back brace in the future.

Tovar was absent from work beginning August 29, 1990, and continuing at least through September 17, 1990. Tovar contends that she was off work pursuant to doctor's instructions. Plaintiff's response in Opposition to Defendant's Suggestions in Support of Motion for Summary Judgment, p. 21, para 5. The record indicates, however, that Drs. Tillema and Wertzberger had concluded that

Tovar should continue with light duty-work. On September 17, 1990, IBP personnel manager Rodger Brownrigg wrote a letter to Tovar asking her to come in and talk to him about her absence, stating that her failure to do so would result in her termination.[1]

On September 25, 1990, Ebberts completed Tovar's vocational rehabilitation plan pursuant to K.S.A. §44-510g(e)(1). The objective of the plan was for Tovar to return to work at IBP with certain accommodations. Ebberts noted that IBP had offered Tovar a

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[1] Tovar also claims that on October 1, 1990, Nancy Downs visited her at home and threatened to fire her if she did not report to work. The only evidence which Tovar submits to support this assertion, however, is a letter dated October 1, 1990, from her attorney, David O. Alegria, to IBP in-house counsel, Gary Korte, in which Alegria states that Tovar telephoned and gave him this information. Such letter is inadmissible hearsay and will not be considered by the Court on the motion for summary judgment.

position within her physical capabilities, that tovar wanted to return to that position, and that while Tovar continued to complain of pain, physicians had been unable to document a medical cause for the pain. Ebberts further noted that in spite of prior disruptions in Tovar's work service, IBP "continue[d] to work with Mrs. Tovar in an effort to assist her in returning to full time employment." The report continued as follows:

> It should be noted that Dr. Tillema, as well as Dr. Wertzberger have released Ms. Tovar to work part time (4 hours per day, 5 days per week). In order to maintain her employment with IBP it is important for Ms. Tovar to attempt to work four hours per day. Should she choose not to attempt to work four hours per day, the alternatives are: request a leave of absence, quit or be fired.

Ebberts also outlined Tovar's responsibilities under the plan as follows:

1. Maintain regular contact with counselor by phone.
2. Alert counselor of any changes

in her physical condition.

3. Participate fully in vocational rehabilitation plan.

The Assistant Rehabilitation Administrator approved the plan on October 8, 1990.

Dr. Wertzberger had previously asked Tovar to return to her light-duty job. Nonetheless, on September 28, 1990, he gave her a four-week off-work slip stating that she was under his care for herniated lumbar disc and could return to work on approximately October 29, 1990. On October 29, 1990, Tovar returned to Dr. Wertzberger for further evaluation. In his records of the October 29 visit, Dr. Wertzberger made the following note:

> [Emma] apparently was in court and is wanting to remain off work and take a visit to her mother. I told her that I could not comply with that request. We are now in the process of getting her fitted for a brace and I want her to continue with therapy and return to light duty in three weeks. . . . She appears to be insistent upon maximizing her problem rather than working toward getting better. . . .

Dr. Wertzberger nonetheless gave Tovar a

four-week off-work slip with a work return date of November 26, 1990.

On November 23, 1990, Tovar returned to Dr. Wertzberger. At that time he provided another four-week off-work slip, with a work return date of December 29, 1990. On November 26, 1990, IBP in-house attorney Gary Korte sent Dr. Wertzberger a picture of IBP employees performing the trim job and a description of the job, in order to aid Dr. Wertzberger's evaluation of Tovar. In that letter, Korte also discussed the possibility of a plant tour for Dr. Wertzberger.

On December 28, 1990, Tovar returned to Dr. Wertzberger for further evaluation. At that time he provided her with a six-week off-work slip. On February 8, 1991, Tovar again returned to Dr. Wertzberger. At that time he noted a diagnosis of spinal stenosis and executed an eight-week off-work slip with a work return date of

May 11, 1991.

On February 18, 1991, Korte asked Dr. Wertzberger for documentation explaining why Tovar had been off work for so long. Korte also expressed concern that there may be no solution to Tovar's problem. By letter dated March 8, 1991, Dr. Wertzberger advised Korte that while Tovar could not work in a captive sitting position, she could possibly perform a position which would allow "both sitting and standing, with minimal lifting and bending."

On April 2, 1991, Korte wrote to Dr. Wertzberger inquiring whether Tovar had reached a medically stable condition and, if so, requesting a functional impairment rating on Tovar as well as any long-term recommendations. Shortly thereafter, on April 4, 1991, Dr. Wertzberger informed IBP that Tovar had reached a medically stable condition. On April 22, 1991,

Tovar, returned to Dr. Wertzberger for evaluation and treating of her permanent disability. Based on that evaluation, Dr. Wertzberger gave Tovar a six-month off-work slip, until October 21, 1991. He also informed IBP that while Tovar could not return to her previous work, she might be able to carry out a portion of her work activities "if she were capable of standing and sitting intermittently without the necessity of repetitive twisting maneuvers."

IBP questioned the fact that Dr. Wertzberger had taken Tovar off work for six months, when all previous off-work periods had been for four to eight weeks at a time.

During the time that Tovar was off work pursuant to Dr. Wertzberger's instructions, Korte wrote a total of five letters to Dr. Wertzberger regarding Tovar's being off work. Dr. Wertzberger

considered IBP's interest in Tovar's condition to be "unusual" but he testified that IBP did not interfere with her treatment.

On May 10, 1991, IBP personnel director Rodger Brownrigg completed a medical leave of absence form for Tovar for the period of time beginning October 29, 1990, leaving blank the space for an ending date.[2]

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[2] Tovar claims that under the leave of absence form, she could have remained off work until October 29, 1991. IBP Policy No. 107 recognizes three types of leave (medical, personal, and military) and requires that all leave of absence requests be "filed in writing by the employee" on a prescribed form. With respect to medical leave, Policy 107 provides in relevant part as follows:

> Regular employees, who through a written statement from his/or her physician, expects [sic] to be off work in excess of five (5) days shall be granted a medical leave of absence. The maximum length of a medical leave is twelve (12) months. Written statement s will include beginning and ending of leave and diagnosis of reason for

On May 24, 1991, Ebberts provided Dr. Wertzberger a job analysis for a position picking trim from the bone belt and asked

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leave. * * *

> An employee off work due to extended illness or injury shall be kept on the payroll in a leave of absence status for a period not to exceed twelve (12) months from the last day of active work.

Under the policy, when a doctor releases an injured employee to return to work, the employee must return to work and attempt to perform the job. If the employee believes that notwithstanding the medical release she cannot perform the job, and so informs IBP, the employee may receive a medical leave of absence. Such leaves are negotiated on a case by case basis and in each case, the employee is responsible for keeping IBP apprised of current medical information and work plans.

Tovar claims that the medical leave policy is selectively enforced and discriminatorily applied to terminate employees who exercise their legal rights under the Workers' Compensation Act. The record is devoid of evidence, however, that Tovar ever requested a leave of absence under Rule 107, or that after Dr. Wertzberger released her to work, Tovar communicated any request for medical leave due to extended pain, illness or injury.

him to "evaluate the position for appropriateness in regards to Ms. Tovar's physical condition and ability to return to work." Ebberts sent copies of her letter to both Tovar and Tovar's attorney, David O. Alegria. On May 31, 1991, Dr. Wertzberger replied to Ebberts as follows:

> Dr. Tillema and I agree on her functional capacity capabilities, and I would advise progressing into a full-time work activity over approximately two months. I have personally observed the particular job and agree that it is highly sedentary, requiring the ability to intermittently change positions, turn around or move in the work space, while continuing to comply with the job requirements.
>
> Based on my observations of this task I would conclude that Ms. Tovar will be capable of working into a full-time work activity over the next two months.[3]

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[3] Dr. Wertzberger had toured the Emporia plant with Korte on May 11, 1991 to familiarize himself with the jobs available and view the various accommodated positions for injured employees. At that time he personally watched an IBP employee perform the job of picking fat from the trim belt. IBP informed Dr. Wertzberger that the position

Without re-examining Tovar, Dr. Wertzberger released her to try the position for four hours a day, working into full time activity over a two-month period.

On June 13, 1991, Ebberts informed IBP that Dr. Wertzberger had released Tovar to work on a part-time basis, confirmed that the position was available, and informed Alegria that Tovar should report for work on June 17, 1991. Ebberts also communicated this information to Tovar by mail. After the work return date had passed, on June 19, 1991, Alegria wrote to Korte.

He enclosed a letter from Dr. Wertzberger which postponed Tovar's

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could be re-designed for Tovar so as to eliminate the need for twisting maneuvers, with the opportunity to sit and stand intermittently during the course of the job performance. Although Dr. Wertzberger did not actually view the accommodated job, he concluded that Tovar was physically capable of performing it.

release date to July 1, 1991 -- not because the earlier release date had been premature but because Tovar had been out of the country on that date. Alegria represented that Tovar would return to IBP on July 1, 1991.

Tovar returned from Mexico on June 23, 1991, and learned that she was to report for work on July 1, 1991. Tovar did not report to work, however, allegedly because of in pain. Instead, on July 10, 1991, Tovar reported to Dr. Wertzberger and requested a letter stating that she could not work. Dr. Wertzberger refused to provide such a letter. His notes of that visit are as follows:

> Emma returned from Mexico. She wants a letter stating that she cannot work. Actually I sent a letter to Mr. Korte saying that I thought she could pick fat. Emma finished the thing saying that she does not "want to work in pain."
>
> Ms. Tovar has problems and obviously requires an accommodation to her physical and spinal stenosis but I

> believe she is capable of the most sedentary work activity I can imagine, based on my observations of the picking fat job.

Korte received a copy of Dr. Wertzberger's notes from the July 10 visit.

On July 25, 1991, Ebberts prepared a Vocational Progress Plan Report which noted that she had been unable to reach Tovar or determine her intent with respect to returning to work, and that she was awaiting further information from Alegria. In late July, 1991, Brownrigg learned that Tovar had not returned to work despite her medical release. According to IBP attendance policies, IBP could terminate employees after three no-call/no-show dates. Brownrigg therefore informed Korte that Tovar would be terminated for job abandonment. Korte suggested a two-week waning letter, as an alternative, and he sent such a letter to Alegria on August 2, 1991. In that letter, Korte noted that

the plant was "totally and completely unaware of Ms. Tovar's whereabouts," and that if Tovar did not return within two weeks, i.e. by August 16, 1991, she would be terminated. Tovar was aware of Korte's letter and the August 16 deadline but, instead of return to work on that date, left for Mexico on August 10, 1991.

On August 16, 1991, Alegria contacted Korte to report that he was having difficulty contacting Tovar. Alegria requested additional time to get Tovar back to work. In response, Korte extended Tovar's deadline to August 19, 1991. Tovar did not appear at IBP on August 19, 1991, and IBP terminated her employment.

On August 26, 1991, Tovar showed up for work unannounced. She met with Downs, who informed her that the job had been terminated and that she should call her attorney.

At the time of her termination and on

August 26, 1991, IBP had suitable work available which Tovar could perform.

IBP claims that Tovar had no communications with IBP after the July 1, deadline, either personally or through her attorney. Tovar, on the other hand, insists that whenever IBP asked her to return to work, she either reported for work or communicated to Nancy Downs that she was unable to do so. Tovar cannot specifically recall any particular communication with Downs, however, and her deposition testimony on this issue is extremely vague and grossly contradictory.[4]

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[4] Although at one point Tovar claimed to have contacted Downs between July 1 and August 26 regarding her return to work, Tovar contradicted herself numerous times with respect to this fact. Tovar first stated that she thought she had been in contact with IBP during the month of July, 1991; however, she stated that she was not in the plant during that month and she did not remember talking or sending a letter to anyone at IBP. Tovar depo., p. 46. She then stated that she had been in contact with IBP between July 1 and August 26, 1991, because every time

Downs maintains that her only contact with Tovar throughout the entire summer of 1991 occurred on August 26, 1991, when Tovar showed up unexpectedly for work.[5]

Since her termination, Tovar has sometimes suffered loss of appetite and sleeplessness.

B. Discussion

Kansas law recognizes a public policy

IBP requested that she report to work, she went and talked to Nancy Downs. Tovar depo., p. 49-50. Next, Tovar said that although she could not remember the exact date, she "thinks" that she spoke to Downs because "[e]very time IBP called [her] and told [her] that [she] had to talk to them, [she] went and talked to them." Tovar depo., p. 51-52. Finally, Tovar stated that it was "possible" that she had talked to Downs.

[5] Tovar points out that Downs testified in the workers' compensation hearing that she had been dealing with Tovar face-to-face in getting her back to work up until the time she was terminated. Although this testimony may arguably create a fact issue as to the extent of communication between Tovar and Downs, the Court finds it is not clear and convincing evidence to support that Tovar communicated with Downs regarding her absences after July 1, 1991.

exception to the employment-at-will doctrine for employees discharged in retaliation for the exercise of their rights under the Workers' Compensation Act. Murphy v. City of Topeka, 6 Kan.App. 488, 630 P.2d 186 (Kan. App. 1981). The cause of action extends to an employee who is fired for being absent or failing to call in an anticipated absence as the result of a work-related injury. Coleman v. Safeway Stores, Inc., 242 Kan. 804, 816, 752 P.2d 645, 652 (1988). Nevertheless, an employer may terminate an injured employee pursuant to a neutral attendance policy where the employee is unable to perform the job and where the employer does not have suitable work available which the employee can perform. See Raymond v. Archer Daniels Midland Co., 762 F.Supp. 901, 904-905 (D. Kan. 1991); Rowland v. Val-Agri, Inc., 13 Kan.App.2d 149, 152, 766 P.2d 819, 822 (Kan. App.

1988); Murphy 6 Kan.App. at 490. Obviously, the employer can also terminate an employee who refuses to perform suitable work.

On September 27, 1993, the Court certified the following question to the Kansas Supreme Court:

> Where an employee-at-will claims that an employer terminated his or her employment in retaliation for the exercise of statutory rights under the Workers' Compensation Act, K.S.A. §44-501 et seq., and that he or she is therefore entitled to maintain a cause of action for wrongful discharge under Kansas law, is plaintiff required to prove that claim by clear and convincing evidence?

The Kansas Supreme Court answered in the affirmative. Ortega v. IBP, inc., ___ P.2d. ___, 1994 WL 221601, No. 70,408, p.25 (Kan. 1994). Thus, Tovar must prove her claim for retaliatory discharge by clear and convincing evidence.

Under Kansas law, clear and convincing evidence is not a quantum of

proof, but rather a quality of proof. Barbara Oil Co. v. Kansas Gas Supply Corp, 250 Kan. 438, 827 P.2d 24, 32 (1992). In other words, plaintiff must establish her claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. Id. The Kansas Supreme Court has given the following definition of clear and convincing evidence:

> [T]he witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; ;and the witnesses must be lacking in confusion as to the facts at issue.

Nordstrom v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980) (citation and quotations omitted).

In order to establish a prima facie case of retaliatory discharge, plaintiff must show (1) that she filed a claim for

workers' compensation benefits or sustained an injury for which she might assert a future claim for such benefits; (2) that ibp had knowledge of plaintiff's compensation claim or the fact that she had sustained a work-related injury for which she might file a future claim for benefits; (3) that IBP terminated her employment; and (4) that a causal connection existed between the protected activity or injury, and the termination. See Courter v. K-Mart Corp., 1988 WL 219717, *3 (D. Kan. 1988); Pilcher v. Board of Co. Commissioners of Wyandotte Co., 14 Kan.App.2d 206, 213, 787 P.2d 1204 (Kan. App. 1990).

Once plaintiff presents a prima facie case, the burden of production shifts to defendant to rebut the inference that its motives were retaliatory, by articulating a legitimate, non-retaliatory reason for

the discharge.[6] If the employer meets this burden of production, the presumption of the prima facie case is rebutted and drops from the case. St. Mary's Honor Center v. Hicks, 113 S.Ct. at 2749. Ultimately, plaintiff's burden is to show that the discharge was "based on" the exercise of rights under the Workers' Compensation Act (or a work-related injury for which she might thereafter file a claim for benefits).[7] See Brown v. United Methodist

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[6] In its certification opinion, the Kansas Supreme Court noted that Kansas courts utilize the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), for discrimination and free speech employment cases. See Ortega, No. 70,408 at pp. 22-23. The Court believes that Kansas courts also would apply the McDonnell Douglas framework to workers' compensation retaliatory discharge cases.

[7] As a practical matter, the Court believes that Kansas courts would interpret this test analogously to the federal employment discrimination cases which require that the retaliatory intent be "a motivating factor" in the termination decision. See Ortega v. IBP, inc., ___ p.2d at ___, 1994 wl 221601, no.

Homes for the Aged, 249 Kan. 124, 147-148, 815 P.2d 72, 88 (1991).

Tovar claims that IBP terminated her employment on August 19, 1991, in retaliation for the filing of her workers' compensation claim two years earlier, on August 15, 1989. To establish a prima facie case Tovar must show (1) that she filed a claim for workers' compensation benefits; (2) that IBP had knowledge of such claim; (3) that IBP terminated her employment; and (4) that a causal connection existed between the protected activity and the termination of her employment. The first three elements are not disputed. As to the fourth element - causal connection - Tovar has failed to produce clear and convincing evidence to establish a prima facie case. The undisputed facts reveal that Tovar knew

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70, 408, p.23 (citing Larson v. Ruskowitz, 252 Kan. 963, 850 P.2d 253 (1993)).

that Dr. Wertzberger had released her to begin part-time work, and that IBP expected her to report to work on July 1 and August 16.[8] Tovar failed to report to work on those dates, and she has not shown by clear and convincing evidence that her absences was legitimately due to any work related injury.

Tovar claims alternately that she did not report to work because (1) she had a statutory right to not work in pain; (2) she had the right to refuse to participate in a work hardening program, which she characterizes as "medical treatment"; and (3) in 1989 or 1990 Greg Stromgren had told her not to return to work until she felt okay to do her regular job. Tovar has provided no authority to support her claim that she had a statutory right to not work in pain. The Court is aware of

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[8] The record is unclear whether Tovar knew of the August 19 extension.

none. Likewise, Tovar has failed to support her proposition that Dr. Wertzberger's release for part-time work was "medical treatment" and, if so, that she had the right to refuse such treatment. Finally, no jury could reasonably conclude that Tovar entertained a reasonable belief that she could refuse to report to work because of Stromgren's alleged statement one to two years earlier - especially in light of IBP's clear demands that she report to work.

Under Kansas law, an employee is not vested with an absolute guarantee of employment merely because she has sustained a work-related injury. Moreover, even if Tovar had a valid excuse for not reporting to work, she has failed to produce clear and convincing evidence that she communicated any such excuse to IBP. In light of Dr. Wertzberger's medical release, IBP's demands that tovar

report to work, and the lack of clear and convincing evidence that Tovar communicated to IBP any reason for her absence, no reasonable jury could infer that IBP could reasonably anticipate that Tovar would be absent as the result of a work-related injury. To the contrary, the only reasonable inference on this record is that IBP lawfully terminated Tovar's employment pursuant to its no-call/no-show policy.

Tovar argues that Korte's effort, with Dr. Wertzberger, to get Tovar back to work demonstrate retaliatory intent. Tovar, however, points to nothing unreasonable about Korte's communications with Dr. Wertzberger. Finally, Tovar attempts to show that IBP fosters a "hostile working environment" for injured workers.[9] Tovar has failed, however, to

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[9] Tovar alleges the following facts concerning IBP workers' compensation

policy:

IBP is self-insured for workers' compensation purposes and utilizes in-house counsel for its workers' compensation work. IBP keeps track of workers' compensation costs, and sets an annual goal of $350.00 per person.

At some time not specified in the record, IBP had safety incentive programs to reward departments that went for periods of time with no injuries. Mike Fiehler, general manager of the IBP plant in Emporia, was aware of situations in 1992 in which some IBP employees pressured or got mad at employees that reported injuries. IBP has a profit-sharing program. Employees have been told that if there are less injuries there will be more profits and bonuses in everybody's pockets.

Mr. Russell, an ex-IBP employee who supervised Tovar at one time but had nothing to do with her termination, testified that "[i]t's a fairly common practice at IBP that if somebody has suffered an injury that is going to be long-term that they find a reason to dismiss them.: Mr. Russell said he was told to observe employees who had sustained injuries and to report back anything they might have done. Specifically, he was told to watch an injured employee named Curtis Repp, who was eventually fired for destruction of company property.

Jennifer Domkowski, a lead person for IBP, stated that when she attended daily

produce clear and convincing evidence to support a reasonable inference that any such tactics were the motivation behind

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meetings from approximately January to May, 1993, she twice heard Bob Wallace (supervisor of the supervisors, and Tovar's supervisor at the time she was fired) tell the supervisors to get rid of anyone who got hurt. He said that he did not care how they did it. but to just get rid of the injured employee. Domkowski also stated that the trim belt (the job Tovar was assigned to return to) is known as the "firing belt" because IBP places the injured employees there until it finds a pretext to fire them because of their work injury.

IBP investigates workers' compensation claimants who are suspected of filing fraudulent claims.

Out of the employees that IBP terminates after work-related injuries, 42 percent are fired within 30 days of the date of injury, four percent are fired between 40 to 60 days from the date of injury, and 35 percent are fired 90 days or more after the date of injury. Tovar does not provide the overall percentage of injured employees who are fired, however, nor does she give the overall percentage of non-injured employees who are terminated generally. Thus, without being able to compare the turnover rate of injured employees to that of non-injured employees, the numbers provided by Tovar are meaningless to the Court.

her termination.

In other contexts, Tovar has complained that the Court has effectively eliminated her right to a jury trial by excluding all evidence as to other retaliatory conduct by IBP, specifically, by disallowing the testimony of 36 former IBP employees who would provide anecdotal evidence of a pattern and practice of retaliation by IBP. See Brief of Plaintiffs, pp. 9-10, Ortega v. IBP, inc., No. 70,408 (Kan. 1994). On August 4, 1993, the Court struck 36 individuals from plaintiff's witness list. Plaintiff represented, in boilerplate language, that each of the witnesses would testify

> . . . regarding defendant's pattern and practice of retaliation against employees injured as a result of work related accidents; defendant's underhanded means of terminating employees as a result of employees' work related accidents; defendant's activities designed to harass and mistreat injured workers; defendant's procedures to obstruct injured employees' ability to obtain workers'

> compensation benefits; and hostility towards him or her with regard to his or her own workers' compensation claim.

Plaintiff made no effort to establish that any such witness worked in the Emporia plant, at any relevant time period, or in any relevant work situation. Therefore, based on boilerplate and cumulative description provided by plaintiff, the Court found that the probative value of such testimony was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay, waste of time, and needless presentation of cumulative evidence. Order (Doc. #110). Out of an abundance of caution, however, the Court allowed plaintiff until August 10, 1993, to articulate with specificity a subject of proposed testimony on which said witnesses might properly testify. Plaintiff

provided none.

As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's retaliatory intent. Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990). However, plaintiff must demonstrate that the circumstances of the employees are such that their statements can "logically or reasonably be tied to the decision to terminate [the plaintiff]." Id. at 1156-1157 n.2 (quoting Schrand v. Federal Pacific Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988)). Here, Tovar has failed to establish any circumstances surrounding the 36 individuals, let alone that their circumstances are such that their anecdotal testimony may reasonably be tied to the decision to terminate tovar. Moreover, the Court did not excluded all evidence of a pattern and practice of

retaliation by IBP. The Court allowed Tovar's discovery requests for information on IBP employees who within the last three years had filed workers' compensation claims and were terminated by IBP, which allowed plaintiff access to information relating to statistical disparate treatment. See Journal Entry (Doc. #67), April 30, 1993, p. 6.

On this record, Tovar has failed to provide clear and convincing evidence of a causal connection between her filing a workers' compensation on August 15, 1989, and her termination on August 19, 1991. Defendant's motion for summary judgment should therefore be sustained as to plaintiff's claim for retaliatory discharge.

As a matter of law, there is no evidence to support Tovar's claim that IBP's actions were extreme and outrageous, or willful and wanton, or that Tovar has

suffered severe emotional distress. Defendant's motion therefore should also be sustained as to Tovar's claims for intentional infliction of emotional distress and punitive damages. See Anspach v Tompkins Ind., Inc., 817 F.Supp. 1499, 1506-1509 (D. Kans 1993).

IT IS THEREFORE ORDERED that Defendant IBP inc.'s Motion for Summary Judgment (Doc. #94) against plaintiff Emma Tovar should be and hereby is sustained.

Dated this 30th day of June, 1994 at Kansas City, Kansas.

Kathryn H. Vratil
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

EMMA TOVAR,

Plaintiff - Appellant,

and

ARNOLDO ORTEGA

Plaintiff,

v.

IBP, INC.,

Defendant - Appellee.

Nos. 94-3263
and 94-3384
D. Kansas
(D.C. No. 92-2351-KHV)

ORDER AND JUDGMENT*

Before **SEYMOUR**, **PORFILIO**, and **ANDERSON**, Circuit Judges.

Emma Tovar appeals from a summary judgment and resulting dismissal of her

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

retaliatory discharge action against IBP, Inc. She contends that the district court erred by applying a clear and convincing evidence standard of proof, and that genuine issues of material fact preclude summary judgment. Both in her briefs on appeal and in oral argument by counsel, Ms. Tovar stresses that the focus should be on the motives and intent of IBP, not on her actions or inaction.

In Ortega v. IBP, Inc., 255 Kan. 513, 528, 874 P.2d 1188 (1994), the Kansas Supreme Court, responding to a certified question regarding the burden of proof in a retaliation case, stated:

> A party having the burden of proving a discharge from employment in retaliation for having filed a workers compensation claim must establish that claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it.

While the outer perimeter of this standard may be elusive, the district court was easily within int in this case. See Memorandum and Order dated June 30, 1994, pp. 13-14.

We have considered the record and the arguments of counsel and conclude that the district court did not err. We AFFIRM the district court substantially for the reasons set out in its thorough Memorandum and Order of June 30, 1994.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMMA TOVAR,	)	
	)	
Plaintiff - Appellant,	)	
	)	
and	)	
	)	
ARNOLDO ORTEGA,	)	
	)	
Plaintiff,	)	
	)	Nos. 94-3263
	)	94-3384
v.	)	
	)	
IBP, INC.,	)	
	)	
Defendant - Appellee.	)	

ORDER
Entered July 8, 1996

Before SEYMOUR, Chief Judge, PORFILIO, and ANDERSON, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judge of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

Patrick Fisher, Clerk

By L. Balzano
Deputy Clerk